SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1902.

No. 186.

THE OREGON AND CALIFORNIA RAILROAD COMPANY,
Appellant,

vs.

THE UNITED STATES,
Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

SUPPLEMENTAL BRIEF OF APPELLANT.

The grant to the railroad was in 1866. The initiatory step taken by the appellant to obtain its indemnity lands was the filing of its map of definite location in March, 1870, when its grant took effect as to place land and its right to select indemnity land accrued. The exercise of this right

of selection was then denied to the appellant by the complainant in this suit upon the ground that the lands were unsurveyed. If upon the filing the map of definite location in 1870, and the completion of the road in 1872, the government had performed its obligation to the railroad and surveyed the land promptly, this case would not have arisen, as the appellant would have selected the land long prior to its occupancy by the settlers in this case.

The inchoate right of the railroad to indemnity land created by the Act of 1866, and made a fixed and certain inchoate right by the filing of the map of definite location in 1870, was perfected by the filing of selection lists in 1892, prior to any claim to the land being entered in the land office by the occupants thereon.

The question presented is whether the railroad, which took its first step to acquire its indemnity land long before the occupancy by the settlers and was prevented by the government from taking its final step also before such occupancy, but did take such final action prior to any final action on the part of the settlers, is entitled to the land, or whether the claimant with the junior inchoate right and the last perfected

right should take it. If the two claimants in this case were both individuals, the one represented by the appellant would unquestionably be given the land. If the two claimants were both railroads, the land would be awarded to the appellant. The decision would be placed upon the old maxim of first in time, first in right, and as the appellant took the first proceeding for the acquisition of its title by filing its map of definite location in 1870 (long before the other claimant had gone on the land) and had first taken the final step to perfect that title, it would have been given the land.

The controversy then comes to this: Is a different rule to prevail in the case at bar because one of the claimants is a railroad and the other a settler, and if so, why? In other words, is the broad principal of equity and the doctrine of Shepley vs. Cowan, 91 U. S., 330, to be disregarded because a railroad is a party to this suit and is the court prepared to depart from the wise and just rule laid down in Tarpey vs. Madsen, 178 U. S., 215; Northern Pacific vs. Colburn, 164 U. S., 383; Whitney vs. Taylor, 158 U. S., 85, and Buxton vs. Traver, 130 U. S., 232 (relates to unsurveyed lands), that the rela-

tive rights as between a railroad and an individual are determined by ascertaining which one first filed record evidence of its claim in the land office.

The government insists that a different rule should govern this case than would be invoked if both claimants were individuals or both claimants were railroads, because of the recent decision in Nelson vs. The Northern Pacific Railway Company, and it therefore becomes necessary to examine this case and see what bearing (if any) it has upon the case at bar.

The question decided in the Nelson case was that an occupant who settled upon unsurveyed public land *before* the filing by the railroad of a map of definite location was entitled to the land.

In the present case the occupant settled upon the land *long after* the filing of the map of definite location.

It is true that in one case the land was place land and in the other indemnity, but the filing of the map of definite location is as necessary a step in the acquisition of title to indemnity land as it is in the case of place land.

In the Nelson case the delay of twenty years (from 1864 to 1884) in filing the map of definite

location which enabled the occupant to make his settlement was a delay on the part of the railroad company for which it alone was responsible.

In the case at bar the delay in filing the selection list which gave the occupant his opportunity to settle was not that of the railroad, but of the government the complainant in this suit.

In the Nelson case the railroad was not required to carry the troops and supplies for the United States free of charge so long as the nation existed. In the present case it is and its grantor (complainant in this suit) after driving such a shrewd bargain should under the ordinary principles of equity be astute to see that its grantee receives the full consideration for the contract, instead of ever striving to take from it the little which it has succeeded in obtaining.

In the case at bar the question is to which of two claimants shall be given a tract of land, the title to which they are both permitted to perfect after a certain given point of time. Shall it be given to the one who first takes the necessary proceeding, when he also had the first inchoate right and took the first initiatory step to perfect that right, or shall it be given to the other?

The record and opinion in the Nelson case can

be searched from one end to the other and no such question will be found, and we therefore say that for the many reasons we have given, the Nelson case in no way controls the present controversy, which must stand or fall upon its own merits.

The government gave to the railroad the right to select its indemnity land upon the filing of the surveys in the land office, just as much as it gave the occupant the right to make his entry at the same point of time. The right was first given to the railroad. Now the government having given the same right under different systems of law to two people, if the rule that the person first exercising that right is not entitled to the land, we respectfully ask what rule is to determine the rights between them.

MAXWELL EVARTS,
Of Counsel for Appellant.

APPENDIX.

Letter to the Secretary of the Interior from the Commissioner of the General Land Office.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.

WASHINGTON, D. C., March 3, 1903.

I, W. A. RICHARDS, Commissioner of the General Land Office, do hereby certify that the annexed copy of office letter of June 29, 1900, addressed to the Secretary of the Interior, is a true and literal exemplification from the record of said letter in this office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and caused the Seal of this Office to be affixed, at the City of Washington, on the day and year above written.

[SEAL. UNITED STATES GENERAL LAND OFFICE.]

(Signed) W. A. RICHARDS,
Commissioner of General Land Office.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

WASHINGTON, D. C., June 29, 1900.

The Honorable

The Secretary of the Interior:

SIR.—In accordance with the directions of the Department (6 L. D. 276) and the requirements of the act of March 3, 1887 (24 Stat., 556) an examination with a view to its adjustment has been made of the grant to the Oregon and California Railroad Company in the State of Oregon by act of July 25, 1866 (14 Stat., 239), and I hand you herewith a statement of the results of such examination for your information and such instructions or suggestions as you may deem proper.

The examination shows the whole area of the grant in the primary (20 miles) limits to be 3,821,901.80 acres, of which amount there are chargeable against the grant 2,128,979.36 acres, thus leaving an apparent loss in said limits of 1,692,922.44 acres, 215,914.10 acres of which are lost by reason of falling within conflicting limits of prior grants and the remainder by entries, filings, etc.

The area of the indemnity (30 miles) limits is shown to be 1,779,352.10 acres, of which 472,197.49 acres have been otherwise disposed of, leaving available in this limit (at the time of the examination), for the purpose of satisfying the grant, 1,307,154.61 or 385,767.83 acres less than the required amount, even in the improbable event of the company obtaining title to all the lands shown at the time of the examination to have been available for the grant.

In connection with the deficiency in the grant above reported, however, attention is called to the fact that there have been erroneously patented to the company 6,963.33 acres outside the limits of its grant and 1,576.67 acres within its limits, but also in the limits of

prior grants. While the title to these lands, amounting to 8,540 acres remains in the company they should be charged against the amount the company is entitled to, and by so doing the deficiency above reported will be reduced to 377,227.83 acres as shown by the statement.

Attention is also called to the item "In limits but patented to other roads" under heading of "Chargeable to the grant" in the primary limits.

This item covering 34,436.43 acres is made up of 541.87 acres in the primary limits of the Oregon and California Railroad and the indemnity limits of the Oregon Central Military Road, and 33,894.56 acres in the conflicting primary limits of the grant under consideration and the Coos Bay Military Road grant.

As to the 541.87 acres in the conflicting limits of the Oregon and California Railroad and the Oregon Central Military Road, I have to say that they are in the primary limits of the former grant, opposite its definite location of March 26, 1870, and title passed by such definite location, so that when the indemnity withdrawal was ordered March 31, 1871, on account of the latter grant no right of selection passed thereunder and the approval of the lands for the Military Road was therefore erroneous and the lands should be charged against the *railroad* as part of its grant and against the Military Road as "Erroneously approved" to it.

Respecting the 33,894.56 acres in the conflicting limits of the Oregon & California Railroad and the Coos Bay Military Road, it appears that these lands were approved to the latter road under a decision of this office of January 8, 1874, holding that priority of right depended upon priority of definite location and not upon priority of grant.

This ruling was clearly erroneous, as was the approval of the lands to the Military Road, and they should therefore be made a charge against the railroad as a part of its grant and as in the case first mentioned

charged against the Military Road as "Erroneously approved."

In the examination other lands are charged as erroneously approved to the railroad because at the time the company's right attached by definite location or selection they had been otherwise disposed of and as to these lands shown by the statement to amount to 5,688.88 acres, rule has this day been laid upon the company to show cause, etc., under the act of March 3, 1887, *supra*, as to all lands not included in patented entries or demands made or suits instituted.

As to those lands falling within the limits of prior grants it will be observed that they are all charged in the body of the statement as "lost" to the grant, although as hereinbefore stated 1,576.67 acres of such lands have been patented to the Oregon & California Company and are charged against the amount the company is entitled to in the recapitulation, as are also the 6,963.33 acres reported as patented to the company outside of its limits.

Rule has this day been laid upon the company to "show cause," etc., as to the lands erroneously patented outside of its limits, but as to those erroneously patented to this company in the limits of prior grants, as well as those erroneously patented to other companies in the limits of this grant, as aforesaid, no rule will be laid, the companies being left to adjust the matter between themselves.

The statement of the result of the examination is herewith marked "A."

Very respectfully,

B. W. M.

BINGER HERMANN,
Commissioner.

"A."

Statement of Adjustment of the Grant for the Oregon & California Railroad Company by Act of July 25, 1866 (14 Stat., 239), Primary (20 miles), and Indemnity (30 miles) Limits.

PRIMARY (20 MILES) LIMITS.		
Whole area		3,821,901.80
CHARGEABLE TO GRANT.		
Properly approved	1,700,450.08	
Erroneously approved	2,346.33	
Listed and subject to grant	21,691.10	
Vacant and subject to grant	366,358.91	
Entries and filings on lands otherwise subject to grant	40.00	
Disposals after definite location	245.92	
Pending decision	3,410.59	
In limits, but patented to other roads	34,436.43	
Total chargeable in primary limits		2,128,979.36
LOST TO GRANT.		
By entries, filings, etc	1,476,768.69	
Limits Ore. Cent. Military Road	53,013.95	
Limits Corvallis & Yaq. Bay Wagon Road	57,130.16	
Limits Will. Val. Cas. Mt. Wagon Road	105,769.99	
Erroneously listed	239.65	
Total lost in primary limits		1,692,922.44
Making chargeable and lost equal area of grant		3,821,901.80

INDEMNITY (30 miles) LIMITS.

Total area		1,779,352 10

CHARGEABLE AS INDEMNITY.

Properly approved	798,185.20	
Erroneously approved	2,342.55	
Selected and subject to grant	82,204.97	
Pending decision	2,534.67	
Total chargeable as indemnity		885,267.39
Otherwise disposed of	472,197.49	
Vacant and subject to selection	421,887.22	
		894,084.71
Making chargeable, disposed of and vacant		1,779,352.10

RECAPITULATION.

(Basis of Chargeability.)

Area of primary limits		3,821,901.80
Chargeable in primary limits		2,128,979.36
Apparent loss in primary limits		1,692,922.44
Chargeable in indemnity limits		885,267.39
Apparent amount due under grant		807,655.05
N.B.—From the last amount should be deducted, because patented outside limits	6,963.33	
And because patented in limits of prior grants	1,576.67	
Total deducted for above reasons		8,540.00
Apparent amount yet due under grant		799,115.05
Vacant and subject to selection in indemnity limits		421,887.22
Apparent deficiency in grant		377,227.83

(Basis of Approvals.)

Area of primary limits		3,821,901.80
Actually approved, properly	2,498,635.28	
" " erroneously	4,688.88	
" " outside limits	6,963.33	
" " other limits	1,576.67	
Total actually approved		2,511,864.16
Actually due under grant		1,310,037.64